Supreme Court, U.S.
FILED
SEP 25 1996
CLERK

(3)

NO. 96-47

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

ROGER D. FLEENOR,

Petitioner,

v.

HEWITT SOAP COMPANY; BILL HATMAKER; KEN WALLET; RON HILL,

Respondent.

BOYD UNDERWOOD, AGENT FOR THE HEWITT SOAP CO., INC.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONER

KELVIN L. BODDIE
Counsel of Record
120 West Second Street, Suite 636
Dayton, OH 45402
(937) 461-1399

Counsel for Petitioner

7PP

PARTIES TO THE PROCEEDING

1. Roger D. Fleenor (hereafter referred to as "Fleenor"), Plaintiff in the District Court and Petitioner.

2. Hewitt Soap Company (hereafter referred to as "Hewitt Soap"), Defendant in the District Court and Respondent.

3. Bill Hatmaker (hereafter referred to as "Hatmaker"), Defendant in the District Court and Respondent.

4. Ken Wallet (hereafter referred to as "Wallet"), Defendant in the District Court and Respondent.

5. Ron Hill (hereafter referred to as "Hill"), Defendant in the District Court and Respondent.

6. Boyd Underwood (hereafter referred to as "Underwood"), Defendant in the District Court and Respondent.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

Conley v. Gibson, 355 U.S. 41 (1957) 2

EEOC v Hacienda Hotel,
881, F.2d 1504 (9th Cir. 1989) *3*

Harris v. Forklift Systems, Inc., 510 U.S. 17,
114 S.Ct. 367, 126 L.Ed.2d 295 (1993) 2

Hirschfeld v. New Mexico Corrections Dept.,
916 F.2d 572 (10th Cir. 1990) 3

Meritor Savings Bank v. Vinson,
477 U.S. 57, 106 S.Ct. 2399,
91 L.Ed.2d 49 (1986) 2

Pullman-Standard v. Swint,
456 U.S. 273, 102 S.Ct. 1781,
72 L.Ed.2d 66 (1982) 2

Quick v. Donaldson Company, Inc.,
90 F.3d 1372 (8th Cir. 1996) 1

Wilson v. Seiter, 111 S.Ct. 2321 (1991) 2

STATUTES:

42 U.S.C. @2000e-2(a) 1

ARGUMENT

THE SIXTH CIRCUIT ERRED IN APPLYING THE MOTION TO DISMISS STANDARD OF REVIEW BY FAILING TO CONSIDER THE FACTS IN PETITIONER'S COMPLAINT IN A LIGHT MOST FAVORABLE TO PETITIONER PRIOR TO AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S SEXUAL HARASSMENT CLAIM.

The Sixth Circuit Court of Appeals in an attempt to avoid the same-sex sexual harassment question failed to apply the correct motion to dismiss standard of review and therefore affirmed the district court's dismissal of Petitioner's 42 U.S.C. @2000e-2(a) ("Title VII") claim. In addition, the Sixth Circuit failed to apply the correct legal standard with respect to respondent superior liability.

It is undisputed that the issue before the Sixth Circuit was same-sex sexual harassment. It is further undisputed that the district court dismissed Petitioner's case because the court determined that a same-sex sexual harassment claim was not cognizable under Title VII. Given the division among the federal courts on the same-sex sexual harassment issue, the Sixth Circuit in an attempt to avoid the issue, determined that Petitioner's Complaint failed to establish respondeat superior liability. See the July 29, 1996 Eighth Circuit decision in *Quick v. Donaldson Company, Inc.*, 90 F.3d 1372 (8th Cir. 1996), wherein the Eighth Circuit held that you could have a same-sex cause of action under Title VII thereby creating a clear split in the Circuits on the issue of same-sex sexual harassment.

When the wrong legal standard has been applied by a lower court this Court usually reverses the decision below.

See *Pullman-Standard v. Swint* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Wilson v. *Seiter,* 111 S.Ct. 2321(1991), and *Harris.* v. *Forklift Systems Inc.,* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In the instant case, the Sixth Circuit not only failed to apply the correct standard of review with respect to the motions to dismiss, but also failed to apply the correct legal standard with respect to respondeat superior liability.

Notwithstanding the Respondent's suggestion that the Sixth Circuit's narrow holding does not raise an important question of federal law, we believe that it most certainly does and the discussion in *Meritor Savings Bank* v. *Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)* regarding agency principles and respondeat superior liability along with the following analysis supports said belief.

First, a finding of respondeat superior liability is critical to the establishment of a sexual harassment claim under Title VII. This element of a Title VII case is no less important than the psychological injury issue addressed in *Harris* by this Court. Each addresses an element of a Title VII claim which is critical to the establishment of the claim.

Second, if the Sixth Circuit had applied the motion to dismiss standard of review established in *Conley v. Gibson, 355* U.S. 41(1957), there would have been at least three ways in which the Sixth Circuit could have found respondeat superior liability based upon Petitioner's Complaint. The Complaint clearly alleges that both Hatmaker and Wallet harassed others in the past and that the Company knew or should have known about the harassment thereby establishing employer liability (Pet. at C-8). Further, since Wallet was Hatmaker's supervisor and it was alleged in the Complaint that Hatmaker was well known in his department as a harasser and had harassed others in the past, employer liability should have been established (Pet. at C-3 and C-8).

In addition, Wallet, was alleged to have participated in the harassment with Hatmaker, thereby creating employer liability. (Pet at C-6). Therefore, if the motion to dismiss standard of review as set forth in *Conley* was properly applied to the allegations in Petitioner's Complaint, then the employer liability should have been established. This conclusion is supported by the decisions on the issue from the Ninth and Tenth Circuits. *EEOC v. Hacienda Hotel, 881, F.2d 1504 (9th* Cir. 1989) and *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572 (10th Cir. 1990).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,
s/s Kelvin L. Boddie
Kelvin L. Boddie
Ohio Reg. #OO29696
120 W. Second St.
STE. 636
Dayton, Ohio 45402
(937) 461-1399

Counsel for Petitioner